Supreme Court, U.S.
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No _____

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 1998

ARETHA ANN ATWATER

Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION

Defendant-Appellee.

On Petition For Writ of Certiorari
To The U.S. Court of Appeals for The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED

I. Whether the Eighth Circuit failed to view evidence in light most favorable to Plaintiff because controverted evidence establishes a genuine issue of material fact that defendant engaged in discriminatory conduct

II. Whether Eighth Circuit failed to view evidence in light most favorable to Plaintiff because controverted evidence establishes a genuine issue of material fact that Defendant's reasons for termination were pretextual

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1) Aretha Ann Atwater

2) Federal Express Corporation.

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OPINIONS AND ORDERS BELOW

The following orders and opinions have been entered by the courts below:

1. Order granting Defendant's Motion for Summary Judgment entered by the United States District Court, Northern District of Iowa, Cedar Rapids Division, Case No. C95-113 on December 16, 1996, as an unpublished opinion. (App. 1).

2. Order of the United States Court of Appeals for the Eighth Circuit denying Appellant's appeal on October 10, 1997, and is a unpublished opinion. (App. 2).

3. Order of the United States Court of Appeals for the Eighth Circuit denying Apellant's Petition for Rehearing on January 13, 1998, and is a unpublished opinion. (App. 3).

JURISDICTION OF THE SUPREME COURT OF THE UNTIED STATES

The date on which the United States Court of Appeals for the Eighth Circuit decided the case was October 10, 1997. (See Appendix 2).

A timely petition for rehearing was thereafter denied on January 13, 1998. (See Appendix 3).

The jurisdiction of this Court is invoked under U.S. CONST. art. III, § 2, cl. 1 which states that the judicial power shall extend to all cases in law and equity arising under the Constitution.

REASONS FOR GRANTING THE WRIT

Petitioner Atwater asks this Court to grant this writ of certiorari for the following reasons. There are several jurisdictional discrepancies for determining the burden of proof and standard to establish a prima facie case involving racial discrimination.

Petitioner also argues that the Eighth Circuit Court of Appeals failed to view evidence in light most favorable to Plaintiff because controverted evidence establishes a genuine issue of material fact that Defendant engaged in discriminatory conduct.

Finally, Petitioner argues that the Eight Circuit Court of Appeals failed to view evidence in light most favorable to Plaintiff because controverted evidence establishes a genuine issue of material fact that Defendant's reasons for termination were pretextual.

STATEMENT OF THE CASE

The appeal is based on Aretha Atwater's employment discrimination claim against Federal Express Corporation (FedEx) on the basis of race, color and sex in violation of Title VII of the 1964 Civil Rights Act (Race, Color and Sex) and 42 U.S.C. 1981 (Race and Color). At the District Court, Honorable Edward J. McManus granted summary judgment for FedEx. The Eighth Circuit upheld the decision, and denied a timely Petition for Rehearing on January 13, 1998. Atwater asserts that the lower courts erred because the record is replete with direct and circumstantial evidence that discrimination occurred, and therefore a reasonable fact finder could conclude that a genuine issue of material facts exists.

Aretha Atwater is an African-American female with four years of college and only nine credit hours

from earning a Bachelor's Degree in Business Administration. (App. 1, 315). In 1988 she was hired by FedEx as a customer service representative at the Moline, Illinois station. (App. 152-153). Approximately three years later she was promoted to Senior customer service representative. (App. 154). In Spring 1993, Atwater was promoted to Station Manager in Cedar Rapids, Iowa. (App. 01, 158, 223). At the time, Atwater was the only African-American female station manager. (App. 315).

In September of 1993, Atwater received a performance evaluation as Station Manager. (App. 106, 224-227). It was the only evaluation she received, and it was provided by Rogers Kirk, a supervisor instrumental in her promotion. (App. 106, 224-227). Atwater received a 2.9 score (on a 4.0 scale) with no negative comments. (App. 224-227). He orally advised that her

training was commendable and she was learning quickly, despite the absence of an immediate supervisor. (App. 166, 167, 224-227). Atwater received the highest possible score in three categories, including "leadership." (App. 226).

In October 1993, Ratnam Philip, a man of Asian-Indian descent, was hired as Atwater's direct supervisor. (App. 131, 159, 169). Prior to his employment, Atwater never had a problem or complaint with her racially diverse supervisors or coworkers. (App. 154-155). Moreover, she was never counseled or disciplined for an unsatisfactory job performance. (App. 315).

Immediately after Philip was hired, there were a number of discriminatory incidents directed at Atwater. (App. 169, 177-180, 315). He inquired about the gender make-up of Atwater's customer service representatives,

and remarked that there was a lot of confusion about working with women because they are difficult to work with and tend to gossip a lot. (App. 177). Philip also made derogatory sexist comments about Hillary Clinton controlling Bill Clinton. (App. 177-178). In addition, male managers distributed a cartoon jabbing Mrs. Clinton, which prompted Atwater to leave the room. (App. 177-178).

In another conversation, relating to Atwater's maternity leave, Philip commented that pregnant women were "harder to deal with," and Atwater was overly emotional because of her pregnancy. (App. 179). He also stated that Atwater would have problems raising a child in a single-family household and she could not rear a child without problems. (App. 178-79).

During Philip's tenure, Atwater was excluded from managerial communications. (App. 177, 180). She

learned of operational changes through her employees and never received direct communications from Philip regarding his whereabouts or schedule, unlike her male counterparts. (App. 177, 180). Moreover, not only did Philip meet male managers for luncheon meetings excluding Atwater (App. 181), but he also kept an open door between his office and the male manager, while shutting the door to Atwater's office. (App. 177).

Atwater also had problems with Mark Melchert, a white, male manager. Apparently, he had authority to change the make-up of Atwater's work group, even though he was a peer, not her superior. (App. 163, 177). He also evoked racist comments during a company luncheon meeting, speaking in the tone or pitch of an uneducated black person. (App. 165). On another occasion, he noted that Atwater's subordinate called her a "bitch." (App. 164).

Problems escalated when Atwater returned to work on March 1, 1994 after a three-month maternity leave. (App. 169). Inevitably, she had infant-related sicknesses, and arranged for additional vacation and leave. (App. 103, 104, 315). Although Atwater's absenteeism was no greater than other managers, Philip attempted to discipline her for attendance problems and denied her vacation requests. (App. 103-104). He even attempted to force Atwater to "buy back" the vacation. (App. 104).

In May 1994, Philip criticized Atwater for scoring low in the leadership category using an employee-based evaluation. (App. 193). The evaluation group consisted of four African-American females and five Caucasian females, and the ratings were notably divisive among racial lines. (App. 124, 192). Ironically, eight months prior Atwater achieved the highest possible score in the

leadership category. (App. 166, 224-227, 315).

Personnel representative Ms. Helms knew the survey results were racially motivated, especially since a white subordinate indicated that FedEx hired too many minorities (App. 124-125, 161), and another white subordinate referred to Atwater as a "nigger" and "bitch." (App. 12, 109, 124-125). Neither employee was disciplined, despite witness accounts. (App. 109, 112). Helms also knew that other subordinates believed Atwater received disparate treatment from Philip. (App. 119).

Moreover, Philip's boss, Ms. Krinhop, knew that two other African-American females, Carleta Cherry and Nicole Greer, complained about Philip's managerial style. (App. 100, 124). However, Krinhop discounted Cherry's credibility as being racially motivated. (App. 100).

Finally, Atwater contacted the Human Resources Department to complain about the discrimination and unfair treatment. (App. 118, 199). Several meetings were held between Helms, Krinhop, Atwater and Philip. (App. 96, 99, 118-121, 172-173, 316, 416). In all, Atwater reiterated the discriminatory treatment outlined hereinabove. In addition, she noted other disparate treatment: 1) Philip alleged three absences in Fall 1993 where Atwater actually worked (App. 118); 2) Philip subverted her authority by telling subordinates that she lied and was unknowing (App. 99, 180, 188-189, 316); and 3) Philip thwarted Atwater's access to the company computer system and caused her to fail a management certification. (App. 118-121; 187-88).

Philip ultimately admitted to singling out Atwater, acknowledging that she was the only manager whose attendance he monitored. (App. 172- 173).

Consequently, he was counseled for making sexist remarks about the pregnancy, for keeping his door shut on Atwater, and was told not to deny vacation requests that were previously approved. (App. 99, 103, 110). FedEx also determined that Atwater did not miss three work days, and rescinded the proposed disciplinary action. (App. 99, 103, 110).

Shortly thereafter, Philip began investigating Atwater's management practices. He claimed that Atwater told employee Mary Buehler to report a work break that was never taken and then make it up on some later date. (App. 105, 122, 134-137, 260-266). Atwater adamantly denies all allegations that she condoned employee falsification of records. (App. 197, 248-251, 258). Although Buehler confirmed this allegation and claimed undue influence to recant the story (App. 105), the evidence supports Atwater's assertion that Buehler

was pressured by FedEx to provide a false statement under fear of reprisal. (App. 105, 213, 325-326).

FedEx assembled five different hand written statements authored by Buehler. (App. 260-266). In one signed statement, her veracity is discredited when she stated:

> It was also brought up that employees wrote in breaks when they didn't get to take their full breaks (outside the office). I said I had been told to do so once that I recalled and forgot to do so....I have also been approached several times by J. Houser asking me to witness what she says happened on 3-12-94. (over) ...On 5-26-94...Ratnam...said I could be terminated for falsifying a break. He later said I would not be terminated for this. I told Ratnam I could not remember this happening and did not have any personal records to indicate it occurred. Signed Mary Buehler (emphasis added). (App. 261-262).

Despite this precarious evidence, on May 31, 1994 Philip suspended Atwater for falsifying electronic company records. (App. 197).

On June 9, 1994 Atwater filed a discrimination complaint with the Cedar Rapids Civil Rights Commission. (App. 313-319). Atwater continued her discrimination complaints with the Human Resources Department, and expressed concern about Philip's physical acts of intimidation: shaking his finger in her face, raising his voice, and slamming his fists on the table. (App. 204).

Krinhop advised, under these circumstances, Atwater should recess the meeting and reconvene when Philip calmed down. (App. 107-108). Approximately six weeks later, Philip was intimidating and threatening so Atwater declined to hold a meeting until he calmed down. (App. 204, 283-286). Philip angrily threatened her with termination for insubordination. (App. 204, 284-286). He called Krinhop, calmly described the problem. (App. 108, 126). Atwater was suspended and

demoted for insubordination (App. 108, 114, 126).

Philip ultimately made the decision to demote Atwater to customer service representative. (App. 108). She was required to report to work in Milwaukee, Wisconsin within one week (App. 108, 287-288). As a single-parent, Atwater did not have the financial resources to justify the relocation. (App. 179, 305-308, 315).

Pursuant to company policy, Atwater filed written complaints regarding each suspension, demotion and involuntary leave of absence. (App. 284-286, 305-308, 313-319, 320-324, 325-327). Unfortunately, FedEx ruled against her on each claim. (App. 252-253, 278-15 279, 283, 287-288, 295-303, 309, 310, 311, 312). She was eventually terminated 90 days after the expiration of an involuntary leave of absence and the decision to bypass relocation. (App. 304). Atwater's managerial

duties were subsequently assigned to two white male managers. (App. 9, 17).

ARGUMENT AND AUTHORITY

I. Appellant requests that this Court clarify jurisdictional incongruities in determining burden of proof and standard to establish prima facie case involving racial discrimination.

INTRODUCTION: STANDARD OF REVIEW

When analyzing a district court order granting a motion for summary judgment, this Court utilizes *de novo* review. The facts must be viewed in a light most favorable to the non-moving party, and summary judgment is only appropriate where there is no genuine issue of material fact and the movant should prevail as a matter of law. Kinkhead v. Southwestern Bell, 49 F.3d 454, 456 (8th Cir. 1995).

DISCUSSION: To determine if Appellant had a prima

facie case of race or sex discrimination, the Eighth Circuit Court of Appeals looks for four elements. The plaintiff must show 1) she is a member of a protected class; 2) she is qualified for her position; 3) adverse employment action was taken; and 4) the circumstances surrounding the adverse action creates an inference of unlawful discrimination. Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 258 (42 U.S.C. § 1981); Johnson v. Baptist Medical Center, 97 F.3d 1070, 1072 (8th Cir. 1996) (Title VII).

However, in determining the appropriate standard of review and applicable burden of proof, the Eight Circuit Court of Appeals has failed to rule in a consistent manner. The Eighth Circuit has ruled that establishing a prima facie case is not an onerous hurdle in racially motivated discrimination. Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995).

Moreover, plaintiff merely has to establish "some evidence" to create an inference of improper motivation. Id.

Appellant presented evidence that the employer made several racial and sexist comments that clearly establishes "some evidence" to create an inference of improper motivation for employment termination. However, despite the fact that the Eighth Circuit ruled that establishing a prima facie case is not an onerous hurdle, the District Court ruled that Appellant failed to show a genuine issue as to any material fact of discrimination. (App. 1-7).

Based on the Eighth Circuit's precedent, given that "some evidence" inferring racial and sexual discrimination was presented, it is incontrovertible that the District Court and Eighth Circuit are utilizing disparate burdens of proof. It is imperative that these

jurisdictional discrepancies be clarified, and that the United States Supreme Court review this appeal.

Moreover, Appellant requests this Court to resolve the jurisdictional discrepancy pertaining to the burden of proof and standard used to establish a genuine issue of material fact that reasons for employment termination were pretextual. In O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995), the Court specifically rejected the narrow approach of requiring the plaintiff to directly disprove the defendant's exact reason for termination. However, in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993) this Court ruled that the employee must come forward with evidence to show "both that the reason was false, and that discrimination was the real reason." This irrefutable jurisdictional discrepancy must be elucidated to properly corroborate the standard and burden of proof for

establishing a genuine issue of material fact that reasons for employment termination were pretextual. The only rational and balanced means to resolving these jurisdictional incongruities is if the United States Supreme Court grants this writ of certiorari.

Another jurisdictional discrepancy that must be clarified is the burden of proof utilized when ruling on a summary judgment in racial discrimination matters. In Barge, the Eighth Circuit established the burden of proof to "examine the record in the light most favorable to the non-moving party." Id. at 258. Moreover, this Court has ruled that the trial court should act with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed with full trial. Federal Rules of Civil Procedure, Rule 56(c), 28 U.S.C.A.; Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986).

However, in Rothmeier 85 F.3d 1328, 1332 (8th Cir. 1986) the Court inconsistently ruled that the ultimate burden of persuasion remains with Plaintiff at each step of the analysis. Thus, it is evident that the burden of proof used to establish a summary judgment in a racial or sexual discrimination case is ambiguous, and therefore warrants review by the United States Supreme Court.

II. Eighth Circuit failed to view evidence in light most favorable to Plaintiff because controverted evidence establishes a genuine issue of material fact that Defendant engaged in discriminatory conduct

The elements of a prima facie case are as follows: 1) plaintiff is a member of a protected class; 2) she was qualified for the job; 3) she was discharged; and 4) she was replaced by a white male or, the circumstances surrounding the discharge otherwise created an inference of unlawful discrimination. *See* Stevens v. St. Louis

Medical Center, 97 F.3d 268 (8th Cir. 1996); Johnson v. Baptist Medical Center, 97 F.3d 1070, 1072 (8th Cir. 1996). The only element in dispute is whether the circumstances surrounding the discharge created an inference of unlawful discrimination. (Decision, p. 8).

According to the District Court, the following discriminatory action was not sufficient to create an inference of unlawful discrimination:

> it is the court's view that the circumstances surrounding the adverse employment action, including plaintiff's claims of differential treatment as to Philip's closed door, his interacting more with white male employees, his criticisms of her professional performance, his rather innocuous, if impolitic, comments about (1) the effects of her pregnancy on her emotional state, and (2) confusion among the women in her work group, and his not keeping her advised as to his whereabouts to the same extent he did with other employees, do not give rise to an inference of improper motivation for the adverse employment action. Accordingly, plaintiff has not made out a prima facie case. (Decision, p. 8).

However, this rationale, and the Eighth Circuit's subsequent affirmation, does not adhere to the strict legal standard imposed upon the summary judgment movant. Based on the record, there are innumerable factual discrepancies that are material to the issue of discrimination in the workplace.

Moreover, in racially motivated discrimination, establishing a prima facie case is not an onerous hurdle. Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995). The plaintiff merely has to establish "some evidence" to create an inference of improper motivation. Id.

When viewing the facts in a light most favorable to Atwater, summary judgment was inappropriate. Atwater was subject to a series of sexist comments by her immediate supervisor, Ratnam Philip. His comments included:

1) Women are difficult to work with.

2) Women tend to gossip a lot.

3) There is a lot of confusion about working with women.

4) Derogatory comments about Hillary Clinton controlling Bill Clinton.

5) Comments that Atwater was overly emotional because of her pregnancy.

6) Pregnant women are "harder to deal with."

7) Comments that Atwater would have problems raising a child without a man in the household. (App. 177-180).

In addition to these sexist comments, Philip's actions further create an inference of discriminatory motives in the way he treated Atwater.

First, there is abundant evidence that white, male managers were given preferential treatment. Philip

maintained a closed-door policy with respect to Atwater and an open-door policy for white, male managers. He excluded Atwater from luncheon meeting that were intended for the white, male managers.

Second, Philip was involved in numerous discriminatory acts that were not directed to the white, male managers. Philip removed Atwater from the communication loop, undercut her authority with subordinates, failed to inform her of operational changes, failed to allow her timely access to company computers for training sessions, criticized her in front of other employees, and accused her of lying. (App. 108, 141, 173, 177, 180, 187-189). Third, Philip instituted blatant discriminatory acts by fabricating employee violations to justify Atwater's termination. He attempted to improperly discipline her for absenteeism on three occasions, but FedEx determined that Atwater worked on

the alleged dates. Furthermore, Philip only documented Atwater's attendance but never documented the absenteeism of other employees or managers. Philip also singled out Atwater for an investigation and recommended her suspension and demotion. (App. 108, 141, 173, 177, 180, 187-189).

Lastly, a chronological recapitulation of workplace events explicitly portrays Philip's discriminatory treatment. Prior to having Philip as a supervisor, Atwater was an exemplary employee with no disciplinary action or negative evaluations. She was a valued employee who was regularly promoted for satisfactory work and good performance evaluations. During this 5-year tenure she maintained an admirable employee record. Even the evaluation immediately prior to Philip's hire indicated that Atwater had excellent leadership skills.

It was only after Philip was hired that problems arose. His sexist comments signify an overt disdain for women, and Atwater's pregnancy and immediate maternity leave only intensified his disapproving perception. Derogatory comments about Hillary Clinton dominating her husband only reinforced this negative perception of women in managerial or supervisory roles. Inevitably, Atwater's return from maternity leave was met with resistance and she was unilaterally excluded from the male-dominated activities.

It was only after reporting the discriminatory acts to the Human Resources Department that Philip engaged in selective discrimination by singling out Atwater for retaliation. He began investigating her background to find any policy violation worthy of punishment. When he alleged that Atwater falsified electronic company records, Philip relied upon inconclusive evidence to

justify the witch hunt. (App. 197, 261-262).

The cumulative effect of this evidence creates a reasonable inference of discrimination. Reasonable minds could conclude that Philip acted in a discriminatory manner. His blatant acts of malevolence, disparate treatment and sexism adequately satisfy the burden of proof set forth in Landon. At the very least, Atwater established "some evidence" to create an inference of improper motivation. *See* id. at 624. Thus, there remains a genuine issue of material fact that the circumstances surrounding Atwater's discharge created an inference of unlawful discrimination.

CONCLUSION

For all of the reasons urged in this Writ of Certiorari, Appellant prays this Court to hear this case to clarify jurisdictional discrepancies, reverse the December 16, 1996 order granting summary judgment and remand the case for trial.

Respectfully submitted,

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ARETHA ANN ATWATER

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ARETHA A. ATWATER, Plaintiff,	)	No. C95-113
vs.	)	ORDER
FEDERAL EXPRESS CORPORATION, Defendant.	)	

This matter is before the court on defendant's resisted Motion for Summary Judgment, filed May 31, 1996. Granted.

Following her demotion and the termination of her employment, plaintiff, an African-American female, brought this employment discrimination action in three counts alleging race discrimination in violation of 42 USC§§1981 and 2000e-2 (Count 1), sex discrimination in violation of 42 USC§§2000e-2 (Count 2), and unlawful retaliation for complaining of race and sex discrimination in violation of 42 USC§§1981 and 2000e-3 (Count 3). Plaintiff seeks damages and reinstatement. The court has jurisdiction pursuant to 28 USC§§1331 and 1343.

Defendant seeks summary judgment, asserting that any adverse employment actions resulted solely from plaintiff's unacceptable conduct.

In this employment discrimination action, under either 42 USC § 1981 or 42 USC§2000e-2, plaintiff must establish a prima facie case by showing that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the circumstances surrounding the adverse action create an inference of improper motivation. See Barge v. Anheuser Busch, 87 F.3d 256, 258 (8th Cir. 1996) (42 USC § 1981 as applied to race discrimination and retaliatory discharge); Johnson v. Baptist Medical Center, 1996 WL 566893 (8th Cir. 1996) (42 USC§2000e-2 as applied to gender discrimination). Upon plaintiff's establishing a prima facie case, a rebuttable presumption of discrimination is created; the employer must then articulate a legitimate nondiscriminatory reason for its conduct. St. Mary's Honor Center v. Hicks, 509 US 502, 506-508 (1993). If the employer does so, the burden then returns to plaintiff to prove that the employer's reasons are pretextual, and that intentional discrimination was the true reason for the employer's actions.

The following facts appear undisputed: Plaintiff began working for defendant Federal Express (FedEx) in August, 1988, as a part time customer service agent in Moline, Illinois, and eventually became a senior customer service agent there. In April of 1993, she was promoted to a management position, Operations Manager, in Cedar Rapids, Iowa. When she arrived in Cedar Rapids, Johnny Spears was the senior manager and her supervisor. However, Mr. Spears departed soon after her arrival, and Rogers Kirk was appointed the acting manager. On September 27, 1993, Kirk evaluated

plaintiff in ten categories. The evaluation rating scale was from 0 to 4, with 4 being the highest. Plaintiff received an evaluation of 4 in three categories, 3 in three categories, and 2 in four categories. Leadership, employee selection and development, and oral and written communication were the categories in which she received the ratings of 4. Ratnam Philip was hired as a manager (and pla[illegible]'s supervisor) in October, 1993. In April, 1994, plaintiff failed her "Management Check Ride Certification," and it was recommended that she be retrained. Also in April, 1994, the employees directly under plaintiff's supervision evaluated plaintiff, giving her a leadership index score of 49 out of a possible 100. On May 31, 1994, plaintiff was counseled that she had demonstrated unacceptable performance and poor leadership, and needed improvement. On June 7, 1994, plaintiff was suspended pending an investigation into charges that she falsified company documents. As a result of the investigation, FedEx determined that plaintiff falsified documents pertaining to FedEx employee Mary Buehle's time records in violation of FedEx policy. FedEx's determination was based in part on FedEx employee Mary Buehle's express statements that as to her timecard plaintiff directed her to enter an hour break even though she had not taken a break.(1)

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(1) Plaintiff asserts that Buehle's statements are erroneous, ambiguous, or the result of confusion. Plaintiff does not contend that the statements were fabricated.

On June 9, 1994, plaintiff filed a charge of discrimination with the Cedar Rapids Civil Rights Commission, and on June 23, 1994, she filed an internal complaint of discrimination with FedEx. On August 3, 1994, following plaintiff's refusal to meet with her manager in his office to discuss operational issues, plaintiff was placed on investigative suspension a second time for insubordination. Following investigation, plaintiff's conduct was found to have been insubordinate. On August 19, 1994, plaintiff was demoted to senior customer service agent at FedEx's Milwaukee, Wisconsin office. Plaintiff failed to report to the facility, and on September 1, 1994, she was provided a 90 day leave of absence in which to secure another job within FedEx. Plaintiff submitted no applications to FedEx, and on December 2, 1994, her employment was terminated.

In support of its Motion for Summary Judgment, defendant asserts that the adverse actions complained of by plaintiff did not occur under circumstances which give rise to an inference of improper motivation, but rather were due to plaintiff's falsification of company records, her insubordination, and her performance and leadership problems. Defendant urges that there is no evidence of any lack of good faith in its reliance upon the results of its internal investigations, notwithstanding plaintiff's contention that she did not alter time cards, and that she was not insubordinate. Defendant further asserts that there is no evidence that plaintiff was treated differently from other employees due to sex or race, and that plaintiff's allegations are conclusory. Defendant urges that even if plaintiff is found to have a prima facie case, it has come forward with a legitimate, non-discriminatory

reason for plaintiff's demotion and termination, specifically, her two violations of the company's Acceptable Conduct Policy, and her lack of managerial skills.

Finally, defendant asserts that there is no evidence that plaintiff was demoted in retaliation for her making a civil rights claim. A prima facie retaliation claim requires plaintiff to show that (1) she engaged in protected activity known to defendant, (2) the defendant thereafter took adverse employment action against plaintiff, and (3) plaintiff's exercise in the protected activity, the exercise of her civil rights, was a significant factor in the adverse action taken against her. Stevens v. St. Louis Medical Center, 97 F.3d 268 (8th Cir. 1996). Defendant urges that plaintiff's exercise of her civil rights was not a factor in her adverse employment action, but rather that the action was based solely upon company policy as to falsification of documents and insubordinate behavior.

In support of her contention that she was qualified for the Operations Manager position, plaintiff urges that on September 27, 1993, as noted earlier, Mr. Kirk evaluated her in ten categories, giving her the highest evaluation in three categories, leadership, employee selection and development, and oral and written communication. Plaintiff urges that the Kirk evaluation provides evidence that she was qualified for her position, and contradicts Philip's subsequent negative evaluations of her. Additionally, she urges that in talking with her workgroup, Philip made negative comments about her abilities, undermining her management efforts. In support

of her contention as to disparate treatment by Philip, she asserts that Philip's supervisor, Mary Krinhop, stated that Philip had a low tolerance for what he perceives as being lazy, that he didn't respect plaintiff "[because] the did not approve of her inability to accept responsibility and to work on improving herself." Krinhop deposition at p. 75. Plaintiff urges that the foregoing raises a fact question as to whether she was a poor manager, or whether instead she was qualified, but that Mr. Philip prevented her from progressing and excessively criticized her because she is a black female.

As to the question of whether the circumstances surrounding her demotion and termination create an inference of unlawful discrimination, plaintiff urges that Mr. Philip treated her differently than two other white male managers. She asserts that when she was pregnant, Mr. Philip made the observation that she was emotional and harder to deal with because of her pregnancy. She further urges that in commenting about the women plaintiff managed, Philip stated that the group she managed was difficult, that they gossip a lot and that there's a lot of confusion with women. She asserts that she was excluded from management meetings, and that Philip interacted more with white male managers, including keeping them apprised of his whereabouts. She reasserts that he told her employees that she didn't know what she was talking about, and kept the door between his office and hers closed while keeping another door open that adjoined another manager's office.

Fed. R. Civ. P. 56(c) provides that summary judgment shall be entered if the

> "pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding whether to grant a motion for summary judgment, the district court must view the evidence in favor of the party opposing the motion and give him the benefit of all reasonable inferences. Kegel v. Runnels, 793 F.3d 924, 926 (8th Cir. 1986). However, parties opposing a summary judgment motion may not rest merely upon the allegations in their pleadings. Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). The opposing parties must resist the motion by setting forth specific facts showing that there is a genuine issue of material fact for trial. Id., (citing Fed. R. Civ. P. 56(e) and Burst v. Adolph Coors Co., 650 F.2d 930, 932 (8th Cir. 1981)). Green v. St. Louis Housing Authority, 911 F.2d 65, 68 (8th Cir. 1990).

Beginning with plaintiff's discrimination claims in Counts 1 and 2, it is undisputed that she is a member of a protected class and suffered an adverse employment action.

While the question as to whether she was qualified for the Operations Manager position is not free

from doubt, when considering the matter in accordance with the appropriate standards it is the court's view that the circumstances surrounding the adverse employment action, including plaintiff's claims of differential treatment as to Philip's closed door, his interacting more with white male employees, his criticisms of her professional performance, his rather innocuous, if impolitic, comments about (1) the effects of her pregnancy on her emotional state, and (2) confusion among the women in her workgroup. and his not keeping her advised as to his whereabouts to the same extent he did with other employees, do not give rise to an inference of improper motivation for the adverse employment action. Accordingly, plaintiff has not made out a prima facie case.

Even assuming she had done so, FedEx has met its burden of production in coming forward with a legitimate, nondiscriminatory reason for the adverse action, i.e., reliance upon evidence of plaintiff's falsification of records, insubordination and poor management skills, and plaintiff has not come forward with evidence which, in the court's view, creates a genuine issue of fact as to whether FedEx's decision is pretextual and whether FedEx harbored a discriminatory intent.

Finally, as to Count 3, plaintiff has established that she engaged in protected activity, and that she suffered an adverse employment action. However, in accordance with the foregoing, it is the court's view that plaintiff has not come forward with evidence of causality, that her exercise in protected activity was a

factor in the adverse action taken against her. Additionally, and as noted above, FedEx has come forward with a nondiscriminatory reason for the adverse employment action, and plaintiff has not rebutted this reason with evidence that it is a pretext for discrimination.

It is therefore

ORDERED

Defendant's Motion for Summary Judgment granted.

December 16, 1996.

/s/ Edward J. McManus
Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1218

Aretha A. Atwater,	) Appeal from the United
Appellant,	) States District Court
	) for the Northern District
v.	) of Iowa.
	) [UNPUBLISHED]
Federal Express	)
Corporation,	)
Appellee.	)

Submitted: October 2, 1997

Filed: October 10, 1997

Before WOLLMAN, LOKEN, and HANSEN, Circuit Judges.

PER CURIAM.

Aretha Atwater appeals the district court's (1) grant of summary judgment to her former employer in her employment discrimination lawsuit. Having carefully considered the record and the parties' submissions, we agree with the district court that even assuming that Atwater established the elements of a prima facie case, she failed to establish a genuine issue of material fact as to whether Federal Express's articulated reasons for tile adverse employment action were a pretext for race or sex discrimination. We also agree with the district court that Atwater's related retaliation claim cannot survive summary judgment.

The judgment is affirmed. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

(1) The Honorable Edward J. McManus, United States District Judge for the Northern District of Iowa.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1218NICR

Aretha Atwater,	)	
Appellant,	)	Appeal from the United
	)	States District Court for
vs.	)	the Northern District of
	)	Iowa.
Federal Express	)	
Corporation,	)	
Appellee.	)	

The petition fox rehearing filed by the appellant has been considered by the court and is denied.

January 13, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 21 1998
OFFICE OF THE CLERK

No. 98-35

In The

Supreme Court of the United States

October Term, 1997

ARETHA ANN ATWATER,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit properly affirmed the district court's grant of summary judgment to Respondent by concluding Petitioner presented insufficient evidence to show Respondent's decision to terminate Petitioner was discriminatory?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding. FDX Corporation is a parent company of Respondent. The following are nonwholly-owned subsidiaries of Respondent: Flying Tigers Limited; and The Flying Tiger Line (NZ) Limited.

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STATEMENT OF THE CASE

On April 14, 1995, Petitioner Aretha Atwater filed a complaint against her former employer, Respondent Federal Express Corporation ("FedEx"), alleging race and sex discrimination as well as retaliation in violation of 42 U.S.C. §§ 2000e *et seq.* (Title VII) and 42 U.S.C. § 1981. Atwater's retaliation claim is not part of her Petition for Writ of Certiorari. The district court granted summary judgment in favor of FedEx, concluding Atwater did not establish a prima facie case on her claims, and Atwater did not present sufficient evidence to show that FedEx's legitimate nondiscriminatory reasons for terminating Atwater were a pretext for discrimination. Pet. App. 1-8. The Eighth Circuit, in a unanimous panel decision, affirmed the district court. The Eighth Circuit concluded that even if Atwater established a prima facie case of discrimination, she failed to show that FedEx's articulated reasons for the adverse employment action were a pretext for race or sex discrimination. Pet. App. 2-2.

In August 1988, FedEx hired Atwater as a part-time customer service agent ("CSA") at the company's Moline, Illinois station. Approximately three years later, she was promoted to senior CSA. Pet. App. 1-2. In April 1993, FedEx promoted Atwater to operations manager and transferred her to FedEx's Cedar Rapids, Iowa station. Five months later, she was given a performance review by the interim senior manager at the Cedar Rapids station. Pet. App. 1-2. The senior manager evaluated Atwater in ten categories on a scale of 1 to 4, with 4 being the highest. Atwater's quality of management was rated as a 2, and her overall rating was 2.9. During the performance review, the senior manager orally counseled Atwater on areas in which she would need to improve. (App. at 166-68.)

It soon became evident to FedEx, however, that Atwater would not improve, and as an operations manager, Atwater's

job performance was not satisfactory. Atwater had problems managing the employees in her work group and had conflicts both with her co-managers and her supervisors. In October 1993, Ratnam Philip, an Asian-Indian male, became Atwater's manager. It was apparent that Atwater had a personality conflict with Philip. *See* Pet. App. 1-5 to 1-6.

In April 1994, Atwater failed her management check ride certification. Pet. App. 1-3. During a check ride, a manager rides along with a courier on the courier's route to evaluate the courier's on-road performance. As an operations manager, Atwater needed to be proficient in observing and determining the courier's performance during check rides to enable her to communicate the company's expectations to the couriers and improve their performance. After the FedEx evaluator administered the management certification check ride to Atwater, he determined that based on the skills she demonstrated, "it would have been a grave error to herself as well as the couriers and Federal Express to certify her." (App. at 237.)

Later in April 1994, Atwater's subordinate employees voiced their lack of confidence in Atwater as a manager when they were given the opportunity to evaluate her pursuant to the company's survey feedback action ("SFA") process. Pet. App. 1-3. Prior to becoming a manager, Atwater also completed the SFA process as an employee evaluating her manager. Atwater described the process as a way for the employee to let the manager know areas in which they would like to see improvement by the manager and areas in which the manager had progressed or had experienced problems. (App. at 191.) As a result of Atwater's employees evaluating her with a critically low leadership index score of 49, out of a possible 100, FedEx issued Atwater a letter of counseling dated May 31, 1994. Pet. App. 1-3. The letter informed Atwater that she had demonstrated unacceptable performance and poor leadership and that she must

address those issues immediately. Atwater was also reminded that:

> The Federal Express Manager's Guide describes leadership as the most serious and far reaching in its impact . . . on morale . . . its effects are so great in significance to the Company that managers incapable of handling people cannot be retained in the leadership position.

(App. at 246-47.) FedEx further advised Atwater of ways to address the deficiencies and told her that if she could not repair the relationships with her employees and restore their trust and confidence in her ability to lead them, further disciplinary action ranging from removal from management to termination of employment could result. (App. at 246-47.)

On May 26, 1994, a CSA under Atwater's supervision revealed that Atwater had told her to report breaks on her time cards during periods in which she had not taken breaks in violation of the company's Acceptable Conduct Policy. Pet. App. 1-3. Based on these allegations of falsifying company documents, a preliminary investigation was conducted by Philip that included reviewing the CSA's personal journal of daily events, speaking with Atwater alone and in conjunction with a personnel manager, and receiving written responses from Atwater to certain inquiries. (App. at 196, 248-51, 258.) When it appeared that Atwater was not cooperating with the investigation, and in view of the seriousness of the allegations made against her, Atwater was suspended. (App. at 252-53.) FedEx learned that while Atwater was suspended for time card falsification, she telephoned the CSA and requested her to lie to the company's managing director in an apparent effort to save Atwater's job. (App. at 302.) As part of his continuing probe, Philip then consulted with the managing director for

FedEx's mid-central district, the company's personnel department, and a representative from the labor and employment group of the company's legal department. As a result of the investigation, it was determined that Atwater had violated the company's Acceptable Conduct Policy by falsifying company documents (the CSA's electronic time cards). In accordance with that policy, Atwater admittedly could have been terminated. (App. at 198, 267-70.) Instead, Atwater was allowed to stay in management, was given a warning letter, and her investigative suspension was changed to a disciplinary suspension without pay. (App. at 202, 278-79, 311.)

On August 3, 1994, FedEx suspended Atwater a second time after she again violated FedEx's Acceptable Conduct Policy by being insubordinate to her senior manager, Philip. Pet. App. 1-4. On that date, Atwater refused to meet with Philip, despite his repeated requests. After consultations between Philip, his managing director, the managing director of personnel and the legal department, FedEx issued Atwater a second warning for insubordination and demoted her. (App. at 206, 287-88, 298-303.) The company determined that Atwater's conduct was unacceptable under the company's Acceptable Conduct Policy, which states that "Insubordination or refusal to follow instructions" is a violation of company rules and may result in severe disciplinary action up to and including discharge. (App. at 205, 267-70, 284-86.) Atwater acknowledged that insubordination could have resulted in her termination, instead of her demotion. (App. at 205.)

On August 19, 1994, FedEx informed Atwater that she had been demoted to a senior CSA at the company's Milwaukee, Wisconsin ("MKEA") station effective immediately. Pet. App. 1-4. Atwater failed to report to the MKEA facility within the specified time. Accordingly, on September 1, 1994, Atwater was provided with a 90-day personal leave of absence in which

to secure another job within the company, for which she was qualified and capable of performing. Pet. App. 1-4. Despite Atwater's knowledge of the company's established system to place its employees in other available positions, her awareness that the company posted job openings in each facility, and her receipt of the weekly Career Opportunities Bulletins, which are comprehensive listings of job openings throughout the Federal Express system, Atwater did not submit a single application during that 90-day period. Pet. App. 1-4. On December 2, 1994, because Atwater had not secured another position, and thus failed to return from her leave of absence, her employment was terminated in accordance with the company's leave of absence policy.

During her leave of absence, Atwater filed internal grievances through the company's Guaranteed Fair Treatment Procedure ("GFTP"), claiming that her warning letters for falsification and insubordination, and her subsequent demotion, were unfair. The GFTP is a three-step process by which employees may challenge adverse job actions to three successively higher levels of management. Management at each level has the discretion to uphold, overturn, or modify the lower level's decision, and at each level the employee can submit any evidence for the company's consideration. (App. at 211, 272-75.) Atwater utilized each step of the process, and after the company fully investigated all of the allegations, management's decisions to issue the warning letters and to demote Atwater were upheld at all three levels. (App. at 209, 298-303.)

When experiencing problems as an operations manager at FedEx, and both before the district court and on appeal, Atwater has continuously and summarily concluded that her shortcomings as a manager were essentially the fault of her manager, Philip. In April 1994, after failing her check ride certification, Atwater contacted the company's human resources

department to report what she perceived as unfair and discriminatory treatment by Philip. The company fully investigated Atwater's concerns and determined that the evidence did not substantiate a discrimination claim.

Among the myriad complaints, Atwater claimed that Philip made negative comments about her abilities, excluded her from manager's meetings, excluded her from luncheon meetings, and interacted more with white male managers. Pet. App. 1-5 to 1-6. During her deposition, Atwater testified that she believed Philip's lack of communication was discriminatory due to various alleged comments made by Philip. *See* Pet. App. 1-6. The district court described the stray comments as "rather innocuous" and "impolitic." Pet. App. 1-8. Atwater presented no evidence that would indicate that any alleged discriminatory comment was made when Philip was deciding to discipline Atwater or had any connection with her violations of company policy.

Atwater also takes issue with Philip for a notation on her employee calendar regarding her work absences. Pet. 9. However, Atwater admits she was never disciplined for absenteeism, nor did she consider the calendar notation itself to be a form of discipline. (App. at 174.) Atwater also speculates that Philip had some influence in her failure to pass the management check ride certification. Pet 11. Yet, Atwater cannot identify even one conversation between Philip and the evaluator who conducted the check ride. In fact, Atwater cannot identify any FedEx manager or employee who exhibited the deficiencies she displayed during the check ride certification process. (App. at 177.)

Finally, Atwater claims that, despite all the documentary evidence to the contrary, Philip fabricated Atwater's falsification of company documents. Pet. 12-13. In fact, in so doing, she

submits that FedEx threatened the employee to make false statements. *Id.* Again, Atwater has no evidence whatsoever to support her allegation. (App. at 196.) Moreover, Atwater fails to explain the employee's written statements that Atwater told the employee to report breaks not taken, other than to deny generally that Atwater violated company policy. The district court noted Atwater's evasiveness, stating that Atwater has claimed that the employee's statements are "erroneous, ambiguous, or the result of confusion," but Atwater does not contend the statements were fabricated. Pet. App. 1-3.

REASONS FOR DENYING THE WRIT

This case involves the application of well-established case law governing employment discrimination. This Court recently clarified the standard for deciding summary judgment motions in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Review should be denied in this case because the district court and the Eighth Circuit correctly applied *Hicks* to Atwater's facts and claims, and properly dismissed the claims on summary judgment. Atwater does not argue that *Hicks* should be overturned, nor does Atwater ask this Court to revisit the legal standard for establishing an employment discrimination claim using indirect proof. Further, no conflict among the circuits is even alleged. Atwater instead requests the Court to make another assessment of the facts in her individual case and apply Hicks, for the third time, to determine whether she has presented the appropriate quantum of proof to avoid summary judgment. This fact-bound, narrow issue is not of enough significance to warrant plenary review.

Atwater also contends that the Eighth Circuit has inconsistently applied *Hicks* to the evidentiary showing needed at the prima facie stage of the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) framework. Atwater suggests the Court

grant the petition to further instruct the Eighth Circuit exclusively on the desired standard. Atwater's contention suffers from confusion between the prima facie and pretext stages of the *McDonnell Douglas* model, and a misreading of Eighth Circuit case law. Although Atwater spends the majority of her petition arguing that she has presented enough evidence to establish a prima facie case of employment discrimination, she ignores the fact that both the district court and the Eighth Circuit concluded that she did not present sufficient evidence that FedEx's reasons for termination were a pretext for discrimination. Because the Eighth Circuit has consistently applied *Hicks*, and the district court and the Eighth Circuit applied *Hicks* correctly in Atwater's case, review should be denied.

I.

THE EIGHTH CIRCUIT HAS CONSISTENTLY APPLIED THIS COURT'S DECISION IN *HICKS*.

In the district court, Atwater sought to meet her burden to present sufficient evidence to avoid summary judgment of her employment discrimination claims by invoking the familiar three-step framework enunciated in *McDonnell Douglas*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, and its often court-refined principles, Atwater is permitted to prove her employment discrimination claims with indirect proof by first establishing a prima facie case of race or sex discrimination. Atwater must show: (1) she is a member of a protected class; (2) she is qualified for her position; (3) FedEx took adverse employment action; and (4) the circumstances surrounding the adverse action creates an inference of improper motivation. *Hicks*, 509 U.S. at 506; *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 258 (8th Cir. 1996) (§ 1981); *Johnson v. Baptist Medical Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (Title VII).

If Atwater is able to establish a prima facie case, FedEx may rebut the inference of discrimination raised by the prima facie case by articulating a legitimate, nondiscriminatory reason for the adverse action. *Hicks*, 509 U.S. at 506-07. Once FedEx proffers its nondiscriminatory reason, Atwater must show "both that the reason was false, and that discrimination was the real reason." *Hicks*, 509 U.S. at 515. The Eighth Circuit has consistently followed *Hicks* by making clear that proof that an employer's proffered explanation is false by itself, does not entitle an employee to judgment, rather the evidence must show the explanation is a pretext masking discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334 (8th Cir. 1996). The Eighth Circuit en banc recently held:

> We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. Furthermore, as the *Hicks* court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination.

Ryther v. KARE 11, 108 F.3d 832, 837-38 (8th Cir.) (en banc), *cert. denied*, 117 S. Ct. 2510 (1997).

A. Atwater Misstates the Burden at the Third Stage of McDonnell Douglas.

Atwater contends that the Eighth Circuit has failed to rule in a consistent manner because it has held that establishing a prima facie case is not an onerous hurdle; the plaintiff merely must establish "some evidence" to create an inference of improper motivation, the fourth prima facie element. *See Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir.

1995). Atwater argues that because she has presented "some evidence" to show her prima facie case, summary judgment is not appropriate. Atwater misunderstands that establishing the prima facie elements is only the first part of her burden. Once FedEx articulated its legitimate nondiscriminatory reasons for its employment actions, Atwater had the burden to show that the reasons were a pretext masking discrimination. The quantum of proof at the third stage of the proof model is much different than the prima facie burden. Atwater chooses to ignore the *Landon* panel's explanation of the different burden:

> [The Plaintiff's evidence] is sufficient to meet the fourth prong's minimal requirements of *some* evidence allowing for an inference of improper motivation.
>
> . . .
>
> Having articulated a legitimate business purpose, the burden shifts back to the Plaintiff to meet a more difficult standard; demonstrating that the Defendant's articulated reason for its action was (i) a pretext; (ii) for unlawful discrimination.

Landon, 72 F.3d at 624-25 (citing *Hicks*, 113 S. Ct. at 2748-49).

Neither this Court nor the Eighth Circuit has ever ruled that a plaintiff need only show "some evidence" to establish an employer's legitimate nondiscriminatory reasons were pretext for discrimination, the ultimate question. Quite the opposite is in fact true. In its en banc decision in *Ryther*, the Eighth Circuit stated:

> Panel opinions of this court have consistently held that the district court may grant summary judgment or JAML for the employer *even if Plaintiff has some evidence of pretext* if that evidence, for one reason or another, falls short of proving intention discrimination.

Ryther, 108 F.3d at 848 (Loken, J., filing separate opinion joined by majority of active judges) (emphasis added); *see also Rothmeier*, 85 F.3d at 1335 ("*Hicks* emphasizes that once an employment discrimination case reaches the third stage of McDonnell Douglas, it is to be treated like any other case.").

B. The Eighth Circuit has Consistently Held that the Plaintiff Must Show the Employer's Stated Reason is Pretext for Discrimination.

Atwater also contends that one Eighth Circuit case, *O'Bryan v. KTIV Television*, 64 F.3d 1188 (8th Cir. 1995), provided a lesser standard for plaintiffs than that enunciated in *Hicks*, and thus, is inconsistent. Pet. 19. Atwater points out that in *O'Bryan* the Eighth Circuit noted that a plaintiff may be able to prove employment discrimination without directly disproving the employer's reason for termination if the Plaintiff otherwise presents enough evidence to discredit the reason indirectly. Atwater argues that *Hicks* requires the plaintiff prove the reason is false, and quotes the off-cited language from *Hicks* that the plaintiff must show: "both that the reason was *false*, and that discrimination was the real reason." *Hicks*, 509 U.S. at 515 (emphasis added). The irony of Atwater arguing in her petition for a stricter standard for plaintiffs in the Eighth Circuit notwithstanding, Atwater's contention is incorrect.

This Court in *Hicks* made clear that the plaintiff must show more than the employer's stated reason is unworthy of credence:

> [N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Hicks, 509 at 514-15. The key showing is that the employer's reason is a pretext *for discrimination*, not that the reason is necessarily "false" in a strictly quantifiable sense. This Court has made clear that in the context of the burden-shifting model, "false" means the fact-finder does not believe the reason or rejects it. Indeed, the Court explained:

> The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . .

Id. at 511.

The Eighth Circuit has consistently applied *Hicks* to the third and ultimate stage of the burden-shifting model, and required plaintiffs to put forward evidence that the employers' reasons are pretext for unlawful discrimination. *See, e.g.*, *McCullough v. Real Foods., Inc.*, 140 F.3d 1123, 1128 (8th Cir. 1998) ("[i]t is not enough . . . to *dis*believe the employer; the fact-finder must *believe* the plaintiff's explanation of intentional discrimination") (quoting *Hicks*, 509 U.S. at 519); *Kneibert v. Thomson Newspapers, Michigan Inc.*, 129 F.3d 444, 454 (8th Cir. 1997) ("[P]roof that the defendant's articulated

explanation is false or incorrect does not, standing alone, entitle the plaintiff to [summary] judgment; instead, the showing must be that the explanation is a pretext *for* discrimination."); *Ryther*, 108 F.3d at 837-38; *Roxas v. Presentation College*, 90 F.3d 310, 316 (8th Cir. 1996) ("This burden will not be met by simply showing that the reason advanced by the employer was false; rather, Roxas must demonstrate that a discriminatory animus lies behind the defendant's neutral explanations"); *Rothmeier*, 85 F.3d at 1334.

In *O'Bryan*, the Eighth Circuit adhered to *Hicks* in holding that the plaintiff must show that the employer's stated reason for employment action was pretext for discrimination. The panel pointed out, however, that a plaintiff may raise a genuine issue on whether the employer's action was motivated by a discriminatory intent by producing evidence that indirectly discredits the employer's stated reason, but does not necessarily directly disprove the reason. *O'Bryan*, 64 F.3d at 1192. In so holding, the panel distinguished the nature of the proof from the quantum of proof necessary to overcome summary judgment. This is clearly consistent with the holding in *Hicks* that the fact-finder's disbelief of the stated reason may in certain cases support a finding of intentional discrimination. *Hicks*, 509 U.S. at 511. It is also consistent with *Hicks* that in certain cases, the fact-finder's disbelief of the stated reason may not support a finding of intentional discrimination. *Hicks*, 509 U.S. at 514-15 (holding that even if employer's reason is not believable, plaintiff must still prove discrimination was the real reason.) The Eighth Circuit has consistently held that the bottom line in all cases is: the plaintiff must prove the employer's real reason for employment action is unlawful discrimination.

II.

THE EIGHTH CIRCUIT CORRECTLY APPLIED *HICKS* IN ATWATER'S CASE.

Having misunderstood her burden of proof and the *Hicks* standard for surviving summary judgment, Atwater concludes that the district court should not have entered summary judgment in favor of FedEx because she presented "some evidence" of improper motivation, establishing the fourth element of her prima facie case. Pet. 28. Atwater ignores both the district court's and the Eighth Circuit's holdings that even if she met the lesser burden of establishing a prima facie case, Atwater did not meet her burden of showing FedEx's nondiscriminatory reasons were pretext for discrimination. The Eighth Circuit has consistently followed *Hicks*, 509 U.S. at 511, in holding that the ultimate burden of persuasion remains with the plaintiff at each step of the analysis. *Rothmeier*, 85 F.3d at 1332.

In this case, contrary to Atwater's view, neither the district court nor the Eighth Circuit resolved factual disputes regarding Atwater's workplace violations in the company's favor, rather than hers. Indeed, the district court correctly stated in its decision that it was viewing the evidence in Atwater's favor, Pet. App. 1-7, and portrayed Atwater's alleged facts in its decision, Pet. App. 1-5 to 1-6. What Atwater refuses to acknowledge is that taking the facts in the light most favorable to her, the evidence is insufficient to raise the inference of unlawful discrimination. FedEx came forward with legitimate nondiscriminatory reasons for its employment actions: FedEx disciplined Atwater for falsifying company records, and demoted and terminated her for poor management skills, insubordination, falsifying company records, and failing to seek a different position within the company. Atwater presented no evidence that FedEx's reasons were not believable, let alone pretext for race or sex discrimination.

First, as to falsifying time records, FedEx conducted an investigation that revealed that Atwater told a subordinate employee to report one hour breaks when Atwater knew that the employee had not taken the breaks. (*See* App. at 248-66.) The employee provided statements to this effect during the investigation. FedEx also discovered that Atwater telephoned the employee and requested her to lie to the company's managing director in an effort to save Atwater's job. (App. at 268.) Atwater denies violating company policy and argues that the employee's statements are conflicting and confusing. Nevertheless, as the district court noted, Atwater does not contend that the employee's statements were fabricated. (App. at 86.) Clearly, FedEx was justified in sending Atwater a disciplinary counseling letter as a result of its conclusion that she violated company policy and later relying on this information to terminate her.

Second, as to Atwater's insubordination in refusing to meet with Philip in his office, FedEx placed Atwater on investigative suspension while investigating the situation. The company's investigation revealed that Atwater unjustifiably refused to meet with her supervisor, despite his repeated requests. Thus, FedEx was reasonable in concluding that Atwater was insubordinate within the meaning of the company's rules and in demoting Atwater for the violation.

Finally, Atwater presented no evidence to rebut the company's articulated reliance on Atwater's history of poor management skills as a reason to demote and discharge her. Atwater speculates that the reason her employees gave her a critically low leadership score is that Philip criticized her in front of the employees. Atwater has presented no evidence linking any comment that Philip made to the evaluations of her employees, who worked directly with Atwater. In addition, Atwater has no evidence to link her failure to pass the check ride certification on anything but her lack of skill.

Rather than putting forth specific evidence to show that FedEx's reasons for its actions are pretext for unlawful discrimination, Atwater instead points to stray comments made by Philip that are allegedly discriminatory. The comments themselves, categorized as "innocuous" and "impolitic" by the district court, do not alone indicate that Philip considered Atwater's race or sex when deciding to discipline or discharge her. Atwater fails to tie the comments to the decision-making process involved with her discipline or termination. *See Herrero v. St. Louis University Hospital*, 109 F.3d 481, 484 (8th Cir. 1997) (holding statements only constitute evidence of impermissible motive when made by decision-makers in the termination process and reflect a discriminatory animus permitting inference that animus was motivating factor in termination process). None of these comments were made when Philip investigated or disciplined Atwater for falsifying company records, or when Philip found Atwater insubordinate for failing to report to his office when ordered, which led to her termination. Taken as a whole, these comments by themselves do not reveal a discriminatory animus on Philip's part. *See Ruby v. Springfield R-12 Public School Dist.*, 76 F.3d 909, 912 (8th Cir. 1996).

Atwater also cites one incident in which a subordinate used a racially derogatory term and argues that in general, workplace racial tension can substitute for her showing of pretext by the decision makers in this case. Pet. 10. Clearly, Atwater is mistaken. *See Johnson*, 97 F.3d at 1073 (general workplace comments that were critical of females did not suffice to rebut employer's nondiscriminatory reason and raise inference of discrimination); *Ruby*, 76 F.3d at 912 (holding no reasonable fact-finder could find that employer's reasons for adverse action were pretextual based on racially derogatory comments uttered in workplace).

Even if Atwater did not engage in conduct that violated the company's rules, the company is entitled to rely on the

information it uncovers that reveals the violations if the employer operates on a good faith belief that the information is true. *See Gill v. Reorganized School District R-6*, 32 F.3d 376, 378-79 (8th Cir. 1994) ("We are not concerned with the correctness or wisdom of the reason given for [the employer's] decision. . . . We are not permitted to second guess the [employer] or to correct an unwise decision if the [employer] gave an honest, nondiscriminatory explanation for [the employer's decision]."); *Meiri v. Dacon*, 759 F.2d 989, 996-97 (2d Cir.) (holding employer's proffer of undisputed, documented examples of employee's inappropriate actions at work provided ample basis for employer's honest belief that job performance was inadequate), *cert. denied*, 474 U.S. 829 (1985); *Turner v. Texas Instr., Inc.*, 555 F.2d 1251, 1256 (5th Cir. 1977) (holding employer truly believed that employee knowingly violated the time card policy and even if employee in fact did not knowingly violate policy, employer acting on its honest belief did not unlawfully discriminate). Considering Atwater presented no evidence that FedEx's reasons for its employment action were not believable, or pretext for unlawful discrimination, Atwater failed to meet her burden at the third stage of *McDonnell Douglas*. Thus, summary judgment was appropriate on her discrimination claims.

CONCLUSION

Atwater cannot magically transform her lack of management acumen and her employment problems into evidence that her employer discriminated against her. The record in this case falls far short of establishing race or sex discrimination, and thus, fully supports the district court's grant of summary judgment in favor of FedEx and the Eighth Circuit's affirmance. Both the district court and the Eighth Circuit applied *Hicks* consistently and appropriately. For these reasons, FedEx respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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